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IN THE

Supreme Court of the United States

No. 263 October Term, 1953

JAMES F. MARONEY, Successor to J. W. CLAUDY, Warden, Western State Penitentiary,
PETITIONER,

v.

UNITED STATES OF AMERICA, *ex rel.* DAVID DARCY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND SUPPORTING BRIEF.

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IN THE

Supreme Court of the United States

No. ..... October Term, 1953.

JAMES F. MARONEY, Successor to J. W. CLAUDY, Warden, Western State Penitentiary,
PETITIONER,

v.

UNITED STATES OF AMERICA, *ex rel.* DAVID DARCY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Attorney General of Pennsylvania, on behalf of James F. Maroney, Acting Warden, Western State Penitentiary, prays that a Writ of Certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Third Circuit.

Opinions and Orders Below.

1. The opinion of the Court of Oyer and Terminer of Bucks County, Pennsylvania (App'x. 101-117) is not reported.

2. The opinion of the Supreme Court of Pennsylvania, affirming the judgment and sentence, is reported at 362 Pa. 259, 66 A. 2d 663.

3. The order of the Supreme Court of Pennsylvania dismissing the petition for a Writ of Habeas Corpus is not reported.

4. The orders of this Court denying petitions for Writ of Certiorari are reported at 338 U. S. 862.

5. The order of the Supreme Court of Pennsylvania dismissing a petition for a Writ of Certiorari and reargument is not reported.

6. The opinion of the Supreme Court of Pennsylvania dismissing a petition for a Writ of Habeas Corpus is reported at 367 Pa. 130, 79 A. 2d 785.

7. The order of this Court denying a petition for a Writ of Certiorari is reported at 342 U. S. 837.

8. The opinion of the District Court is reported at 97 F. Supp. 930.

9. The opinion of the Circuit Court of Appeals is reported at 204 F. 2d 407.

10. The order of the Circuit Court of Appeals denying a rehearing is not reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on March 24, 1953. On April 8, 1953, pursuant to Rule 33 of the Circuit Court of Appeals, a petition for rehearing was filed. On April 29, 1953, a rehearing was denied. On July 27, 1953, Mr. Chief Justice Vinson granted the petitioner an extension of time, to August 15, 1953, in which to file a Petition for a Writ of Certiorari.

Questions Presented.

1. Whether a habeas corpus proceeding instituted by a person in custody pursuant to a State criminal judgment on the ground that the judgment is constitutionally void under the Fourteenth Amendment of the Federal Constitution is a suit against the State to which the judicial power of the courts of the United States not possessing direct appellate jurisdiction over State courts does not extend where the State has not consented to the suit, either expressly or impliedly by failure to provide corrective judicial process.

2. Whether the District Court abused its discretion in refusing a plenary hearing on the allegation that respondent was tried in an atmosphere of hysteria and prejudice where (a) no pre-trial application was made for a continuance or a change of venue; (b) only 7 of 20 peremptory challenges were used; (c) sweeping and searching *voir dire* examinations of the selected jurors disclosed no personal prejudice against the respondent or previously formed opinions; (d) no complaint was made in a post verdict motion for a new trial or the appellate or first collateral habeas corpus proceeding; and (e) post verdict statements secured by the respondent from the trial jury clearly manifested an attitude of impartiality.

3. Whether the District Court may inquire into issues which have been waived in the State courts through failure to raise them in the appropriate manner?

4. Whether the qualification of members of a trial jury may be inquired into on habeas corpus?

Constitutional Provisions and Statutes Involved.

CONSTITUTION OF THE UNITED STAES

Amendment XI

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

Amendment XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

* * * * *

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

FEDERAL STATUTES

Section 2241, The Revised Judicial Code, 28 U. S. C. Section 2241.

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * * * *

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * * *

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; * * *"

STATUTES OF PENNSYLVANIA

Section 1—Act of March 18, 1875, P. L. 30, 19 Purdon's Penna. Statutes Annotated, Section 551.

"In criminal prosecutions the venue may be changed, on application of the defendant or defendants, in the following cases:

"First. When the judge, who by law is required to try the same, as a near relative of the prosecutor, or of the defendant, or of the person injured, or has knowledge of facts which make it necessary that he should be a witness in the case.

"Second. When, upon the application of a defendant in a felony, it is made to appear to the satisfaction of the court that, from undue excitement against the prisoner, in the county where the offense was committed, a fair trial cannot be had, or that there exists in that county so great a prejudice against him that he cannot obtain a fair trial, or that there is a combination against him, instigated by influential persons, by reason of which he cannot obtain a fair trial.

"Third. When, upon the trial of any criminal case, an unsuccessful effort has been made to procure and impanel a jury for the trial of the defendant, and it shall be made to appear to the court by the written affidavit of some credible witness that a fair trial cannot be had.

"Fourth. When, upon second trial of any felonious homicide, the evidence on the former trial thereof shall have been published within the county in which the same is being tried, and the regular panel of jurors shall be exhausted without obtaining a jury."

Section 2, Act of March 18, 1875, P. L. 30, 19 Purdon's Penna. Statutes Annotated, Section 552:

"All applications for changes of venue shall be made to the court in which the indictment shall be pending, in such manner as the said court shall direct, and before the jury shall be sworn therein; and if the said court shall be satisfied of the propriety of such change of venue, and that the causes assigned therefor are true, and are within the provisions of the first section

of this act, it shall be ordered that the venue thereof shall be changed to some adjoining or convenient county where the causes alleged for a change do not exist."

Section 206(a), Act of April 9, 1929, P. L. 177, 71 Purdon's Penna. Statutes Annotated 66(a):

Each administrative department shall have as its head an officer who shall, either personally, by deputy, or by the duly authorized agent or employe of the department, and subject at all times to the provisions of this act, exercise the powers and perform the duties by law vested in and imposed upon the department.

(a) The following officers shall be the heads of the administrative departments following their respective titles:

* * * * *

Attorney General, of the Department of Justice;

* * * * *

Section 704—Act of April 9, 1929, P. L. 177, 71 Purdon's Penna. Statutes Annotated, Section 244.

"The Attorney General shall be the legal advisor of the Governor, in the performance of his official duties, and the chief law officer of the Commonwealth.

"He shall exercise such powers and perform such duties as may now or hereafter be vested in or imposed upon him by the Constitution and laws of this Commonwealth."

Section 903 (b)—Act of April 9, 1929, P. L. 177, 71 Purdon's Penna. Statutes Annotated, Section 293.

"The Department of Justice shall have the power, and its duty shall be:

* * * * *

"(b) To represent the Commonwealth, or any department, board, commission, or officer thereof, in any litigation to which the Commonwealth or such department, board, commission, or officer, may be a party, or in which the Commonwealth or such department, board, commission, or officer, is permitted or required by law to intervene or interplead."

Statement.

The respondent was jointly indicted with Harold Foster, Harry Zeitz and Felix Capone, in the Court of Oyer and Terminer of Bucks County, Pennsylvania, for murder growing out of an armed robbery. Capone pleaded guilty. Respondent requested and was granted a severence.

Foster and Zeitz were tried before a jury presided over by Judge Calvin S. Boyer. The jury returned a verdict of first degree murder, and, in the exercise of their discretion, as authorized by Section 701 of The Penal Code of 1939, 18 Purdon's Penna. Statutes Annotated, Section 4701, fixed the penalty at death. The judgment and sentence were affirmed, opinion reported at 364 Pa. 294, 72 A. 2d 282.

The respondent's case was called for trial on Monday, June 7, 1948, the week following the completion of the trial of Foster and Zeitz, before Judge Hiram Keller, President Judge of the Bucks County Court.

Respondent was represented by counsel of 30 years' experience at the Bar, who has been engaged by his aunt on the recommendation of Thomas D. McBride, a leading member of the Philadelphia Bar (Bucks County is contiguous with Philadelphia County), and who subsequently argued the direct appeal before the Supreme Court of Pennsylvania, and was of counsel in the certiorari proceedings in this Court following the affirmance and denial of a writ of habeas corpus by that Court.

There was no application for a continuance or a change of venue.

An entirely new panel of 120 jurors had been summoned for service during that week, 39 of whom were excused for various reasons, leaving a panel of 81 members. The panel

was segregated in the Grand Jury room and called individually for the *voir dire* examinations.

Eight jurors[1] were selected on Monday, June 7, 1948. These jurors were placed under the supervision of court attaches and cautioned to not discuss the case with anyone or among themselves. The following day, Tuesday, June 8, 1948, the remaining 4[2] and 2 alternates[3] were selected. The respondent exercised only 7 of 20 statutorily authorized peremptory challenges. The *voir dire* examinations were most sweeping and searching. All of the persons selected said that they would decide the issue upon the law and the evidence.

The trial lasted several days, during all of which the jury was under the continual supervision of experienced court functionaries.

The trial judge, in his charge, instructed the jury that they were "the sole judges of the questions of fact involved in this case" and they "*must ascertain those facts exclusively from the evidence that was submitted at the trial, not from anything you may have heard or read from sources other than the testimony of witnesses at this trial*" (App'x 66).

Following the verdict, a timely motion for a new trial was made on the sole ground of error in the admission of evidence of prior crimes. Notwithstanding that it might have been presented to the trial court, even at that time,[4]

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[1] *W. D. Pardoe* (App'x. 3-6); *Anna W. Bucher* (App'x. 6-11); *Marvin D. Weidner* (App'x. 12-15); *Jesse H. Horne* (App'x. 15-20); *Oliver C. Landis* (App'x. 21-25); *Franklin T. Fretz* (App'x. 25-29); *Roger Mason* (App'x. 29-35) and *Howard Price* (App'x. 36-39).

[2] *L. Calvin Fluck* (App'x. 40-43); *Elva A. Shive*, (App'x. 44-48); *Ruth G. Bliss* (App'x. 48-51); *Ann L. Reed* (App'x. 51-56).

[3] *William F. Hickey* (App'x. 56-59); *Virginia Brillman* (App'x. 59-61).

[4] *Commonwealth v. Deni*, 317 Pa. 289, 293, 176 Atl. 919; *Commonwealth v. Harrison*, 137 Pa. Superior Ct. 279, 284-285; 8 A. 2d 733; *Commonwealth v. Spallone*, 154 Pa. Superior Ct. 282, 286, 35 A. 2d 727; *Commonwealth v. Balles*, 160 Pa. Super. Ct. 148, 150-151, 50 A. 2d 729.

not a word was said about hysteria and prejudice preventing the impanelling of a fair and impartial jury. Neither was it mentioned on the direct appeal to the Supreme Court of Pennsylvania[5] where respondent was not only represented by trial counsel, but also two other very capable attorneys,[6] in the first habeas corpus proceeding, nor to this Court in the first certiorari proceeding.

Indeed, it was not mentioned to any court, until it became evident, after several fruitless applications for executive clemency, the verdict of the jury and judgment of society would be executed, that it was then, for the first time, mentioned to the Supreme Court of Pennsylvania in an application for certiorari and reargument following the refusal of which the present proceeding was then instituted in the District Court.

The matter was argued before a "two judge" District Court who, following a dismissal of an identical petition by the Supreme Court of Pennsylvania, opinion reported at 367 Pa. 130, 79 A. 785, dismissed the application on the basis of the trial record and prior proceedings and refused a certificate of probable cause for appeal.

Circuit Judge Maris allowed an appeal to the court below.

The matter was first argued on January 7, 1952 before a "three judge" division composed of Biggs, Chief Judge, Kalodner, Circuit Judge, and Burns, District Judge.

It was reargued on December 1, 1952, nearly eleven months later, before the Court of Appeals *en banc*.

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[5] The Supreme Court of Pennsylvania has been prone to rectify an error which justice requires rectified. *Schoeppe v. Commonwealth*, 65 Pa. 51, 57; *Commonwealth v. Brown*, 309 Pa. 515, 523, 164 Atl. 726; *Commonwealth v. Ragone*, 317 Pa. 113, 126-128, 176 Atl. 454. *Delco Co. v. Frick*, 318 Pa. 337, 345, 178 Atl. 135; *Commonwealth v. Kurus*, 371 Pa. 633, 635, 92 A. 2d 196.

[6] *Commonwealth ex rel. Darcy v. Claudy*, 367 Pa. 130, 133, 79 A. 2d 785, cert. den. 342 U. S. 837.

The majority (Biggs, C. J., McLaughlin, Kalodner and Hastie, JJ.) held that the allegation of local prejudice preventing the empanelling of a fair and impartial jury was not, as the District Court concluded, refuted by the record in the prior proceedings, and reversed for a full hearing on that issue.

The minority (Maris, Goodrich and Staley, JJ.) held that the District Court had properly dismissed the petition.

A petition for rehearing was timely filed pursuant to Rule 33 of the Court of Appeals. Rehearing was denied on April 29, 1953.

This Court, on July 27, 1953, by Mr. Chief Justice Vinson, granted the Petitioner an extension of time, to August 15, 1953, in which to file a petition for a Writ of Certiorari to the Court of Appeals.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In granting a certificate of probable cause for appeal.

2. In failing to dismiss the appeal for want of jurisdiction.

3. In reversing and remanding for a plenary hearing.

Reasons for Granting the Writ.

1. In Pennsylvania, at least, it has become a common and general practice for persons under a sentence of death for murder—the only capital crime in Pennsylvania—after all other avenues, executive as well as judicial, have failed to result in deliverance from the sentence, to seek relief from the Federal District Courts on practically every conceivable ground which the ingenuity of the human mind is capable of devising.

Judges, defense lawyers, prosecuting attorneys and trial jurors have all been put on trial in these proceedings.

Delay—in this case over two years—not only invites caustic criticism of the legal system but also results in a substantial stultification of a primary objective of capital punishment—deterrence.

Unseemly conflicts between the Federal and State judicial systems have been engendered.

It is a serious matter and one of grave concern to Pennsylvania whether, after providing corrective judicial process whereby rights secured by the Federal and State Constitutions, as well as the common law, may be adequately protected, it is compelled, against its consent, to submit to an inquiry by Federal Courts, not possessing direct appellate revisory jurisdiction over State Courts, into the Federal Constitutional validity of criminal judgments rendered in their courts of record, frequently affirmed by appellate courts and left undisturbed by this Court on appropriate application. Unquestionably, the other 47 states of the Nation are similarly concerned.

This issue has never been squarely adjudicated by this Court. The cogent reasons, above mentioned, make a square determination of it imperative.

2. The decision of the court below is in conflict with the recent decision of the Court of Appeals for the Second Circuit in *United States v. Rosenberg, et al.*[7]

3. The decision of the court below is in conflict with the recent decision of this Court in *Brown v. Allen.*[8]

4. The decision of the court below is in conflict with the decision of this Court in *In Re Schneider.*[9]

[7] 200 F. 2d 666, cert. den. 345 U. S. 965, reh. den. 345 U. S. 1003.
[8] 344 U. S. 433.
[9] 148 U. S. 162.

ARGUMENT.

POINT I.

The proceeding is a suit against the State of Pennsylvania to which the judicial power of United States Courts not possessing direct appellate revisory jurisdiction over State courts does not extend since the State has not either expressly or impliedly consented to it.

This Court decided in *Hans v. Louisiana*[10] and *North Carolina v. Temple*[11] that the spirit of the Eleventh Amendment extends to suits against a state by a resident thereof.[12]

Should the doctrine of those authorities be applied to this proceeding?

The petitioner submits that the answer to that inquiry is yes.[13]

FIRST. Is a habeas corpus proceeding a suit? This Court has so held on many occasions,[14] and, properly so, under the classic definition of that term by Mr. Chief Justice Marshall in *Cohens v. Virginia*,[15] since the avowed pur-

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[10] 134 U. S. 1.

[11] 134 U. S. 22.

[12] See cases cited, footnotes 38 and 39, *post*.

[13] "* * * *It is this Court's conviction that orderly federal procedure under our dual system of government demands that the state's highest courts should ordinarily be subject to reversal only by this Court and that a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court.* * * *": *Darr v. Burford*, 339 U. S. 200, 217.

[14] *Darr v. Burford*, 339 U. S. 200, 207; *Ex Parte Quirin*, 317 U. S. 1, 24; *Holmes v. Jennison*, 39 U. S. (14 Pet.) 540, 564, 567, 597; *Bryant v. Zimmerman*, 278 U. S. 63, 70; *Ex Parte Milligan*, 71 U. S. (4 Wall.) 2, 112.

[15] "What is a suit? We understand it to be the prosecution, or pursuit of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, 'the being put in possession of that right whereof the party injured is deprived.' 'The instruments whereby this remedy is obtained, are a diversity of suits and actions, which are defined by the Mirror to be the lawful demand of one's right.' Or, as Bracton and Fleta express it, in the words of Justinian, *jus prosequendi in judicio quod alicui debetur.*" Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right.

Footnote continued on following page

pose is to enforce a right secured by the Fourteenth Amendment of the Federal Constitution.

SECOND. Is the Eleventh Amendment "confined" to actions for money judgments? If it is, then the doctrine of *Hans v. Louisiana*[16] and *North Carolina v. Temple*[17] would be inapplicable. In *Missouri v. Fiske*,[18] however, it was held that the Eleventh Amendment was **not** confined to money judgments. The doctrine of those cases, therefore, is not inapplicable to this proceeding on that score.

THIRD. Is the proceeding **by** the respondent, or **by** the United States?

If the latter, then, concededly the entire argument falls.[19]

At the common law, while a judicial inquiry upon habeas corpus was predicated upon the theory that the Crown had "a right to inquire into the causes for which any of the subjects are deprived of their liberty",[20] it was evidently

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Footnote continued from preceding page

"To commence a suit, is to demand something by the institution of process in a court of justice; and to prosecute the suit, is according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a state, we should understand process sued out by that individual against the state, for the purpose of establishing some claim against it by the judgment of a court; and the prosecution of that suit is its continuance. * * *": *Cohens v. Virginia*, 6 Wheat. 264, 407-408.

See also, *Missouri v. Fiske*, 290 U. S. 18, 26.

[16] 134 U. S. 1.

[17] 134 U. S. 22.

[18] "* * * The fact that the motive for the adoption of the Eleventh Amendment was to quiet grave apprehensions that were extensively entertained with respect to the prosecution of state debts in the federal courts cannot be regarded, as respondents seem to argue, as restricting the scope of the Amendment to suits to obtain money judgments. The terms of the Amendment, notwithstanding the chief motive for its adoption, *were not so limited*. Expressly applying to *suits* in *equity as well as at law*, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State. * * *": *Missouri v. Fiske*, 290 U. S. 18, 27. Cf., Worcester County Trust Co. v. Riley, 302 U. S. 292.

[19] *United States v. Texas*, 143 U. S. 621;
Case v. Bowles, 327 U. S. 192;
United States v. California, 297 U. S. 175;
United States v. Utah, 283 U. S. 164.

[20] 3 Blackstone's Commentaries 331; 10 Opinions of the Attorney General of the United States, 74, 88; 9 Halsbury's Laws of England, 2 Ed. pp. 701-702.

not regarded as an action **by** the Crown, but **against** the Crown. This is clearly manifest by *Darnell's Case,*[21] in the Court of King's Bench, three and one quarter centuries ago, in which the Attorney General of England appeared and opposed the application for a writ of habeas corpus for deliverance from custody pursuant to a warrant issued on the order of the Crown.

If it were, in fact, an inquiry **by** the Crown, why, then, did not the Attorney General appear for the applicant Darnell? The answer is clear—it was regarded as an action **by** the individual detained and **against** the Crown.

The same treatment appears to have been accorded such a proceeding in our Federal legal system. For instance, in *United States v. Hamilton,*[22] the very first reported application to this Court for a writ of habeas corpus, the application was resisted by a representative of the Attorney General of the United States.

In the next reported application to this Court, *Ex Parte Bollman* and *Swarthout,*[23] while the Attorney General of the United States declined an opportunity to argue on behalf of the United States, evidently his appearance had been entered and he was present at the application.

In the cases of *Ex Parte Watkins,*[24] *Ex Parte Milligan,*[25] *Ex Parte Yerger,*[26] *Ex Parte Quirin,*[27] and *In Re Yamashita,*[28] all of which were applications to this Court for a writ of habeas corpus, the applications were opposed by the Attorney General of the United States.

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[21] 3 State Trials 1.
[22] 3 Dallas 17 (1795).
[23] 8 U. S. (4 Cr.) 75.
[24] 32 U. S. (7 Pet.) 568.
[25] 71 U. S. (4 Wall.) 2
[26] 75 U. S. (8 Wall.) 85.
[27] 317 U. S. 1.
[28] 327 U. S. 1.

Indeed, the Attorney General of the United States opposed the recent application of Julius and Ethel Rosenberg to this Court at the June 15th Special Term, 1953,[29] for a writ of habeas corpus.

It is obvious that a habeas corpus proceeding is not a suit **by** the United States, at least as far as federal prisoners are concerned, but a suit **against** the United States.[30] Were it not an action **against** the United States, surely the Attorney General of the United States would not have **opposed** the applications. Moreover, if it were an action **by** the United States, it would be the duty of the Attorney General to supervise and the United States attorney[31] to prosecute the application on behalf of the applicant. No one would be so bold as to make such a suggestion.

There is no essential distinction between a habeas corpus proceeding by a federal prisoner and a state prisoner which would justify a difference in result. The proceeding is **by** the individual applicant and not **by** the United States.

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[29] .... U. S. ...., 73 S. Ct. 1152; cf., *Burns v. Wilson*, 346 U. S. 137.

[30] See Longsdorf, Federal Habeas Corpus Acts, 13 F. R. D. 407, 410.

"* * * When the counsel for Milligan presented to the court the petition for the writ of habeas corpus, Mr. Hanna, the district attorney for Indiana, also appeared; and, by agreement, the application was submitted to the court, who took the case under advisement, and on the next day announced their inability to agree, and made the certificate. It is clear that Mr. Hanna did not represent the petitioner, and why is his appearance entered? It admits of no other solution than this—that he was informed of the application, and appeared *on behalf of the government to contest it*. The government was the prosecutor of Milligan, who claimed that his imprisonment was illegal; and sought in the only way he could, to *recover his liberty*. The case was a grave one; and the court, unquestionably, directed that the law officer of the government should be informed of it. He *very properly* appeared, * * *": *Ex Parte Milligan*, 71 U. S. (4 Wall.) 2, 114.

[31] "(a) Except as otherwise provided by law, it shall be the duty of each United States attorney, within his district, to:

(2) Prosecute or defend, for the government, all civil actions, suits or proceedings in which the United States is concerned;

(b) The Attorney General shall have supervision over all litigation to which the United States or any agency thereof is a party and shall direct all United States attorneys, assistant United States attorneys, and attorneys appointed under section 503 of this title, in the discharge of their respective duties." Section 507, Revised Judicial Code, 28 U. S. C. 507.

FOURTH. Is the proceeding against the State? The resistance of the application in *Darnell's Case* by the Attorney General of England, and identical action by the Attorney General of the United States in the several cases cited, clearly demonstrate that it is a proceeding **against** the sovereign—federal or state. Indeed, this Court has said that the State is the real party in interest in a habeas corpus proceeding involving a State criminal judgment.[32] Section 2252 of the Revised Judicial Code[33] is itself demonstrative of that conclusion.

Analytically, that conclusion is compelling. The proceeding is a "collateral attack on the judgment forming the basis of detention."[34] The judgment was rendered in an action by and in the name of the State[35] and against the respondent for a public wrong.[36] If the proceeding results in the nullification of the judgment, it is the State—not the custodian—who is adversely affected. The custodian has no personal interest in the judgment for he has no liability for official action in reliance on it.[37] The result is just as effective compulsion against the State as a money

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[32] *Knewel v. Egan*, 268 U. S. 442, 448; cf. *Ex Parte Milligan*, 71 U. S. (4 Wall.) 2, 114; *Collins v. Miller*, 252 U. S. 364, 371; *Ornelas v. Ruiz*, 161 U. S. 502, 507; *Harkrader v. Wadley*, 172 U. S. 148, 162.

[33] "Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct."

[34] *Goto v. Lane*, 265 U. S. 393, 401; *Frank v. Mangum*, 237 U. S. 309, 331.

[35] "* * * All prosecutions shall be carried on *in the name and by the authority of the Commonwealth of Pennsylvania* and conclude 'against the peace and dignity of the same'." Article 5, Section 23, Constitution of Pennsylvania (Emphasis supplied).

See also *Harger v. Thomas*, 44 Pa. 128, 130; *Commonwealth v. Neuman*, 151 Pa. Superior Ct. 642, 649, 30 A. 2d 698; *Commonwealth v. Shimpeno*, 160 Pa. Superior Ct. 104, 114; 50 A. 2d 39.

[36] *Commonwealth v. Shimpeno, ibid.* 1 Bl. Comm., p. 268; 4 Bl. Comm., p. 2.

[37] 1 East, Pleas of the Crown 334; *Thompson v. Lyle*, 3 W. & S. (Pa.) 166; Cf., *Erskine v. Hohnbach*, 81 U. S. (14 Wall.) 613; *Haffin v. Mason*, 82 U. S. (15 Wall.) 671, 675; *Taylor v. McGrath*, D. C. Cir., 194 F. 2d 883; *Laughlin v. Rosenman*, D. C. Cir., 163 F. 2d 838.

judgment[38] or the specific enforcement of a contract.[39] Indeed, in substance, it is specific enforcement of a right against the State. By necessity, the proceeding is fundamentally and essentially **against** the State.[40]

FIFTH. Has Pennsylvania **expressly** consented to this proceeding? At the threshold, the first pertinent inquiry is whether Section 5[41] of the Fourteenth Amendment **may be regarded** as consent.

This Court has held that the "right of individuals to sue a State in * * * a federal * * * Court, cannot be derived from the Constitution or laws of the United States.[42]

In the Civil Rights Cases,[43] it was held that the Tenth Amendment[44] was restrictive of Section 5 of the Fourteenth Amendment.

The language of this Court and apparently the facts in *Palmer v. Ohio*,[45] indicate that the Eleventh Amendment is restrictive of Section 5 of the Fourteenth Amendment. In-

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[38] Ford Co. v. Dep't. of Treasury, 323 U. S. 459;
Kennecott Copper Corp. v. Tax Comm'n, 327 U. S. 573;
Great Northern Ins. Co. v. Read, 322 U. S. 47;
Smith v. Reeves, 178 U. S. 436.

[39] Hans v. Louisiana, 134 U. S. 1;
North Carolina v. Temple, 134 U. S. 22;
In re Ayers, 123 U. S. 443;
Louisiana v. Jumel, 107 U. S. 711;
Antoni v. Greenhow, 107 U S. 769;
Cunningham v. Macon & Brunswick Railroad, 109 U. S. 446;
Hagood v. Southern, 117 U. S. 52;
Fitts v. McGhee, 172 U. S. 516.

[40] See Home Telephone & Tel. Co. v. Los Angeles, 227 U. S. 278, 285; Tindal v. Wesley, 167 U. S. 204, 223.

[41] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Section 5, Amendment XIV, Constitution of the United States.

[42] *Palmer v. Ohio*, 248 U. S. 32, 34; *Duhne v. New Jersey*, 251 U. S. 311; *Missouri v. Fiske*, 290 U. S. 18, 26.

[43] 109 U. S. 3; See also, *Collins v. Hardyman*, 341 U. S. 651, 659.

[44] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Amendment X, Constitution of the United States.

[45] 248 U. S. 32.

deed, that was the implied holding of this Court in several cases[46] arising under the Fourteenth Amendment, in which the jurisdiction of inferior United States courts was justified on the ground that actions were **not** suits against the State, but **against State officers**, in their individual capacity. Otherwise, it was totally unnecessary for the Court to resort to that reasoning.

Both the pre-Fourteenth Amendment scope of habeas corpus and the express denial of authority to inferior Federal courts to indirectly interfere with State criminal judgments for over three-quarters of a century negatives even a momentary thought that the ratifying states were consenting to the exercise of indirect revisory powers by courts not possessing direct revisory power.

SIXTH. Has Pennsylvania impliedly consented to suit by failing in its constitutional duty[47] to provide corrective judicial process?

The answer to this inquiry is no.

Over three-quarters of a century ago, Pennsylvania statutorily authorized courts in which felony indictments are pending to grant a change of venue when it appears "to the satisfaction of the Court, that from undue excitement against the prisoner, in the county where the offense

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[46] *Reagen v. Farmers' Loan & Trust Co.*, 154 U. S. 362;
Smyth v. Ames, 169 U. S. 466;
Fitts v. McGhee, 172 U. S. 516;
Prout v. Starr, 188 U. S. 537;
Ex Parte Young, 209 U. S 123;
Home Telephone & Tel. Co. v. Los Angeles, 227 U. S. 278;
Truax v. Raich, 239 U. S. 33;
Green v. Louisville & I. R. Co., 244 U. S. 499;
Public Service Co. v. Corby, 250 U. S. 153;
Sterling v. Constantin, 287 U. S. 378;
Western Union Tel. Co. v. Andrews, 216 U. S. 165;
Herndon v. Chicago R. I. & P. Co., 218 U. S. 135;
Ligett Co. v. Baldridge, 278 U. S. 105.

[47] *Mooney v. Holohan*, 294 U. S. 103; *Moore v. Dempsey*, 261 U. S. 86; *Foster v. Illinois*, 332 U. S. 134, 139; *Hedgebeth v. North Carolina*, 334 U. S. 806, 807; *Jennings v. Illinois*, 342 U. S. 104, 111.

was committed, a fair trial cannot be had, or that there exists in that county so great a prejudice against him that he cannot obtain a fair trial * * * ".[48]

The action of the trial court is subject to review.[49] Moreover, the Supreme Court of Pennsylvania has the power to remove the indictment, upon application, and transfer it to another county for trial.[50]

The same issue may also be raised on a motion for a continuance or for a new trial, and the court's action thereon is subject to review.[51]

How can it possibly be said that corrective judicial process was not available to the respondent for the vindication of rights of which he now claims to have been deprived.[52]

Pennsylvania has not, therefore, impliedly consented to this proceeding as a result of any failure to provide adequate corrective judicial process.

SEVENTH. Did the appearance of the Attorney General of Pennsylvania and the District Attorney of Bucks County operate as a waiver of the State's immunity to suit? The answer to this question depends upon whether or not the State has consented to suit.[53]

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[48] Sections 1 (Second) and 2, Act of March 18, 1875, P. L. 30, 19 Purdon's Penna. Statutes Annotated 551 (Second) and 552.

[49] *Commonwealth v. Karmendi*, 328 Pa. 321, 195 Atl. 62;
Commonwealth v. Schurtz, 337 Pa. 405, 409-410, 10 A. 2d 378.

[50] *Commonwealth v. Balph*, 111 Pa. 365, 3 Atl. 220;
Commonwealth v. Delamater, 145 Pa. 210, 22 Atl. 1098;
Commonwealth v. Smith, 185 Pa. 553, 40 Atl. 73;
Commonwealth v. Green, 185 Pa. 641, 40 Atl. 96;
Quay's Petition, 189 Pa. 517, 42 Atl. 199;
Commonwealth v. Ronemus, 205 Pa. 420, 54 Atl. 1095;
Commonwealth v. Reilly, 324 Pa. 558, 188 Atl. 574.

[51] *Commonwealth v. Deni*, 317 Pa. 289, 293, 176 Atl. 919;
Commonwealth v. Harrison, 137 Pa. Superior Ct. 279, 284-285 8 A. 2d 733;
Commonwealth v. Spallone, 154 Pa. Superior Ct. 282, 286, 35 A. 2d 727;
Commonwealth v. Balles, 160 Pa. Superior Ct. 148, 150-151, 50 A. 2d 729.

[52] "So long as the rights under the United States Constitution may be pursued, it is for a state and not for this Court to define the mode by which they may be vindicated": *Carter v. Illinois*, 329 U. S. 173, 176.

[53] *Ford Co. v. Dept. of Treasury*, 323 U. S. 459, 466.

Article I, Section 11 of the Constitution of Pennsylvania provides: "Suits may be brought against the Commonwealth in such manner, *in such courts* and in such cases *as the Legislature may by law direct*[54] (emphasis supplied).

The Attorney General of Pennsylvania is the head of the Department of Justice.[55] He is the legal advisor of the Governor, in the performance of his official duties, and the chief law officer of the Commonwealth and is authorized to exercise such powers and perform such duties as may now or hereafter be vested in or imposed upon him by the Constitution and laws of this Commonwealth.[56] In addition, the Attorney General of Pennsylvania "is clothed with the powers and attributes which envelop Attorneys General at common law."[57]

The Department of Justice has the power and duty "To represent the Commonwealth * * * in any litigation to which the Commonwealth * * * may be a party, or in which the Commonwealth * * * is permitted or required by law to intervene or interplead".[58]

This of course, must be construed consonantly with the Constitution (Article I, Section 11) as authorizing the At-

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[54] "Subject to the limitations arising from the federal nature of our government and the provisions of the federal Constitution the Commonwealth of Pennsylvania is a sovereign State, and, as such, it cannot be sued except with its own consent * * * That consent is conditionally provided by Article I, Section 11 of the State Constitution, which says that 'Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.' * * *" *Kaufman Const. Co. v. Holcomb et al.*, 357 Pa. 514, 516, 55 A. 2d 534.

See also, *Collins v. Commonwealth*, 262 Pa. 572, 575, 106 Atl. 229; *Merchants' Warehouse Co. v. Gelder*, 349 Pa. 1, 7, 36 A. 2d 444; *Bell Telephone Co. v. Lewis et al.*, 313 Pa. 374, 375, 169 Atl. 571.

[55] Section 206(a), Act of April 9, 1929, P. L. 177, as amended, 71 Purdon's Penna. Statutes Annotated 66(a).

[56] Section 704 Act of April 9, 1929, P. L. 177, 71 Purdon's Penna. Statutes Annotated 244.

[57] See *Commonwealth ex rel. Minerd v. Margiotti*, 325 Pa. 17, 30-31, 188 Atl. 524.

[58] Section 903, Act of April 9, 1929, P. L. 177, 71 Purdon's Penna. Statutes Annotated 293.

torney General to represent the Commonwealth only in such courts and in such cases as the Legislature may by law direct". No general law authorizes the Attorney General to appear in behalf of the Commonwealth in the Courts of the United States. The State, therefore, has not consented to the suit.[59]

Nor do the common law powers of the Attorney General of Pennsylvania alter or modify that conclusion for the reasons that the Attorney General, at common law, did not have the power to waive the sovereign's immunity to suit.[60] Even if the Attorney General, at common law, had such powers, those powers were modified by Article I, Section 11 of the Constitution of Pennsylvania. It is clear that the District Attorney's appearance could not possibly work a different result.

EIGHTH. It is the conviction not only of Pennsylvania, but also several, if not all of the states of the Nation, as well as the State courts of last resort[61] that orderly Federal procedure under our dual system of government demands that the states' highest courts should be subject to reversal only by this Court, and that a state's system for the administration of justice should be condemned as constitutionally inadequate, only by this Court [62]— at least until Congress has conferred direct appellate revisory jurisdiction over State courts upon Federal tribunals inferior to this Court.[63]

The power conferred by Section 2241 of the Revised Judicial Code, 28 U. S. 2241, upon District Judges to in-

[59] *Ford Co. v. Dept. of Treasury*, 323 U. S. 459, 468-469.
[60] This could only be done by the Crown's endorsement of a Petition of Right. *United States v. Lee*, 106 U S. 196, 238.
[61] See footnote 13 to Opinion of Mr. Justice Jackson, concurring, *Brown v. Allen*, 344 U. S. 443, 539.
[62] Cf. *Darr v. Burford*, 339 U. S. 200, 217, footnote 13, *supra*.
[63] The Federalist No. 82; 2 Story on the Constitution (5th Ed.) Sec. 1707.

quire into the constitutional validity of State criminal judgments has, in effect, created, in Pennsylvania alone, 12 "one judge" appellate courts and 35 "3 judge" superior appellate courts[64] with power to make findings of fact and conclusions of local as well as Federal constitutional law, at variance with specific and necessarily implied findings and conclusions of the State court of last resort—a much broader appellate[65] revisory jurisdiction than this Court exercises.

With all due respect to the sincerity of the District Judges and the Circuit Judges, it is a matter of most serious concern to the States, especially *because* "there is no table of weights and measures for ascertaining what constitutes due process"[66], *because* of the "two court" rule as to findings and the deference which this Court pays to the inferior Federal courts' interpretation of local law and practice, and last, but not least, *because* of the "slim"[67] opportunity for review in this Court, *whether*, in the absence of their consent, either express or implied, they may be compelled,[68] on the mere allegation of a convicted felon who has absolutely nothing to lose from groundless allegations and everything to gain, to appear in inferior Federal

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[64] There are seven members of the Court of Appeals for the Third Circuit. It is possible to have 35 entirely different three judge divisions.

[65] "The decision that the individual shall be imprisoned must always precede the application for a writ of habeas corpus, and this writ must always be for the purpose of revising that decision, and, therefore, *appellant* in its nature." *Ex Parte Bollman and Swartout* 4 Cr. 75, 101.

See also *Ex Parte Watkins*, 7 Pet. 568.

[66] See opinion of Mr. Justice Frankfurter, dissenting, *Burns v. Wilson*, 346 U. S. 137, 149.

[67] See Opinion of Mr. Justice Frankfurter, dissenting, *Darr v. Burford*, 339 U. S. 200, 235; Griffin v. United States, 336 U. S. 704, 723; Deputy v. DuPont, 308 U. S. 488, 500; Harper & Rosenthal, What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari, 99 U. P. L. R., 293, 297; Harper & Etherington, What the Supreme Court Did Not Do During the 1950 Term, 100 U. P. L. R., 354, 359-362.

[68] The State can't ignore the proceeding and rely upon the Court to protect its interests. Such conduct by the State is frequently construed adversely to the State. Cf. *Collins v. Claudy*, 3 Cir., ... F. 2d .... (May 7, 1953).

courts and defend criminal judgments which have withstood both direct and collateral attack in their courts and this Court has declined to review that judicial action.

What of the principle there must be an end to litigation?[69] What of the principle that the State is entitled to due process?[70] What of the principle that orderly Federal procedure "under our dual system of government, demands that * * * a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court"?[71] What of the principle of forbearance which Federal and State courts must, as a matter of necessity, exercise towards each other?[72] What of the inordinate delay in the execution of punishment—in this case already over two years?[73]

The only practical and satisfactory solution to all of these problems lies in the application of the doctrine of *Hans v. Louisiana*[74] *and North Carolina v. Temple*[75] to this proceeding.

Moreover, if the views of Madison ("* * * It is not in the power of individuals to call any State into Court * * * It appears to me that this * * * ["the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under

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[69] See *Federal Trade Commission v. Minneapolis-Honeywell Co.*, 344 U. S. 206, 213; Cf. *Opinion* of Mr. Justice Clark, *Rosenberg v. United States*, ... U. S. ...., 73 S. Ct. 1152, 1156.

[70] *Stein v. New York*, 346 U. S. 156, 197; *Feeley v. Ragen*, 7 Cir., 166 F. 2d 976, 981.

[71] *Darr v. Burford*, 339 U. S. 200, 217.

[72] *Covell v. Heyman*, 111 U. S. 176, 182;
Darr v. Burford, 339 U. S. 200, 205.

[73] See Opinion of Mr. Justice Reed, dissenting, *Wade v. Mayo*, 334 U. S. 672, 692, and Opinion of Mr. Justice McReynolds, dissenting, *Moore v. Dempsey*, 261 U. S. 86, 93.

[74] 134 U. S. 1.

[75] 134 U. S. 22.

this authority"] can have no operation but this—to give a citizen a right to be heard in the Federal courts; and if a State should condescend to be a party, this court may take cognizance of it." 3 Elliott's Debates, 2 Ed. 533), and Marshall ("* * * I hope that no gentlemen will think that a State will be called at the bar of the federal court * * * It is not rational to suppose that the sovereign power should be dragged before a court" IBID, 555) as this court held in Hans v. Louisiana,[76] are still the criteria that result is compelling.

POINT II.

The District Court did not abuse its discretion in refusing to grant a plenary hearing in the face of the record in the trial, appellate and collateral proceedings which were before it.

The District Court was faced with the following incontrovertible facts: (a) experienced trial counsel, a long time resident of the county in which the trial was held and who had been engaged on the recommendation of one of Philadelphia's leading lawyers, made no pretrial application either for a continuance or a change of venue or certiorari from the Supreme Court to remove the case to another county for trial; (b) the trial jurors, on sweeping and searching *voir dire* examinations manifested no personal prejudice against the respondent; (c) while several of the jurors had read newspaper accounts of the crime and the trial of respondent's accomplices, they had formed no opinion of his guilt of innocence and clearly indicated that they would decide the case on the facts and the law; (d)

[76] "It seems to us that the views of these great advocates and defenders of the Constitution were most sensible and just." 134 U. S. 1, 14.

only 7 of 20 possible peremptory challenges were exhausted; (e) the trial judge, a member of the bar for nearly a half century and a trial judge for nearly a quarter of a century, was satisfied that the respondent had received a fair and impartial trial (App'x. 117); (f) no complaint was made in the numerous post verdict proceedings of the issue now being raised until it appeared that all avenues of escape from the penalty were closed; (g) the post verdict statements secured from the trial jurors and attached[17] to the petition for a writ of habeas corpus (App'x. 129-135) alone clearly refuted the contention that empanelling a *fair and impartial jury* was impossible.

Though this case differs in some minor respects from *United States v. Rosenberg*,[18] a capital case, it is submitted, however, that basically they are in conflict. In Rosenberg, the statutory counterpart of habeas corpus was not allowed to serve as a substitute for an appeal. Here, habeas corpus, is being allowed to perform that office. In *Rosenberg*, it was held that voluntary acquiesence in the trial was a conclusive refutation of the contention that it was impossible to impanel an impartial trial jury. The court below reversed the District Court because it did the same thing. Who is right—the Second Circuit in Rosenberg or the Third Circuit in this case? We presume the Second Circuit in Rosenberg.

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[17] These were stricken from the record by the court below. Excerpts therefrom appear on pp. 29-30 of respondent's Petition in this Court at No. 31 October Term, 1951.
See also, App'x. 129-135.

[18] 2 Cir., 200 Fed. 666 cert. den. 345 U. S. 965, reh. den. 345 U. S. 1003.

POINT III.

It is very doubtful that State remedies have been exhausted.

While the issue of hysteria and prejudice preventing the empanelling of a fair and impartial jury was presented to the Supreme Court in the last collateral habeas corpus proceeding, it does not appear, from the opinion of that Court, that it was squarely adjudicated. Possibly it was not because habeas corpus is not a substitute for an appeal.[79] On the other hand, possibly it was impliedly adjudicated.[80] The court below, however, in *Almedia v. Baldi*,[81] refused to accept anything less than a clear statement as evidence of actual adjudication. Here, however, it did.

If the issue was not adjudicated on the last application for habeas corpus to the Supreme Court of Pennsylvania, State remedies have not been exhausted and the District Court, under the recent decision of this Court in *Brown v. Allen*,[82] would have no power to grant affirmative relief.

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[79] *Commonwealth ex rel. Elliott v. Baldi*, 373 Pa. 489, 493, 96 A. 2d 162.
[80] Ibid.
[81] 195 F. 2d 815.
[82] *Brown v. Allen*, 344 U. S. 443, 486.

POINT IV.

The qualifications of a trial juror may not be probed on habeas corpus.

The appropriate time and place to probe the qualification of a trial juror is on the *voir dire* examination—not in a collateral proceeding.[83] If the rule were otherwise, few would be the criminal judgments which would not be challenged in that fashion. Moreover, it is well settled that the mere reading of newspaper accounts does not in and of itself disqualify.[84] Were the rule otherwise, in this day and age, it would be virtually impossible to have a jury trial.

Conclusion.

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

ROBERT E. WOODSIDE,
Attorney General of Pennsylvania.

August 11, 1953.

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[83] *In Re Schneider*, 148 U. S. 162.
[84] *Reynolds v. United States*, 98 U. S. 145, 155-156;
Holt v. United States, 218 U. S. 245;
United States v. Moran, 2 Cir. 194 F. 2d 623;
Finnegan v. United States, 8 Cir. 204 F. 2d 105.